

# ARKANSAS COURT OF APPEALS

DIVISIONS II & III

No. CACR07-1338

MICHAEL JUSTIN DRAKE  
APPELLANT

V.

STATE OF ARKANSAS  
APPELLEE

**Opinion Delivered** November 19, 2008

APPEAL FROM THE DREW  
COUNTY CIRCUIT COURT,  
[NO. CR-2006-155-3-B]

HON. ROBERT BYNUM GIBSON  
JR., JUDGE

DISSENTING OPINION UPON  
DENIAL OF PETITION FOR  
REHEARING

---

## WENDELL GRIFFEN, Judge

By opinion delivered September 3, 2008, we affirmed the denial of appellant's motion to withdraw his guilty plea, holding that the trial court *implicitly* accepted his guilty plea. Appellant now seeks rehearing of our decision, asserting that the court erred in holding that the trial court accepted his guilty plea. I agree that we erred as a matter of law in holding that a trial court could implicitly accept a guilty plea, thereby foreclosing a defendant's ability to withdraw a guilty plea as a matter of right. Accordingly, I would grant appellant's petition for rehearing, reverse the denial of the motion to withdraw the guilty plea, and remand this case for further proceedings.

Appellant and a co-defendant were jointly charged with several crimes. The State offered appellant a plea agreement in exchange for his testimony against the co-defendant.

Under the terms of the agreement, the State would recommend concurrent prison terms of fourteen years followed by ten years suspended imposition of sentence. The court proposed taking appellant's plea in open court but withholding sentencing until the co-defendant was tried or entered a plea. During the plea hearing, the court went through the normal procedures, including allowing appellant to state that he was in fact guilty and asking appellant to describe the crime. After appellant told the court about the crime, the court announced that "the record was closed." At no point did the court state that it was accepting the guilty plea. On April 4, 2007, appellant filed a motion to withdraw his guilty plea. The following day, he invoked his right against self-incrimination and refused to testify at the co-defendant's trial. At a subsequent hearing, the court denied appellant's motion to withdraw his plea, stating that it had allowed appellant to plead guilty in exchange for a recommendation by the State, a recommendation that it was not bound to follow. The court then sentenced appellant as a habitual offender to a forty-year term in the Arkansas Department of Correction.

Rule 26.1(a) provides, "A defendant may withdraw his or her plea of guilty of nolo contendere as a matter of right before it has been accepted by the court." The first rule in considering the meaning and effect of a statute or rule is to construe it just as it reads, giving words their ordinary and usually accepted meaning in common language. *Aikens v. State*, 368 Ark. 641, 249 S.W.3d 799 (2007). Arkansas courts strictly construe criminal statutes, resolving all doubts in favor of the defendant. *Heikkila v. State*, 352 Ark. 87, 98 S.W.3d 805 (2003). Court rules are construed by the same means and canons of construction used in

statutory interpretation. *Williams v. State*, 347 Ark. 728, 67 S.W.3d 548 (2002).

The trial court's acceptance of the plea agreement is a procedural "point of no return" for a criminal defendant. Prior to reaching that point, a defendant may, as a matter of right, withdraw his guilty plea. That right disappears upon the court accepting that guilty plea. Therefore, it is essential to fairness and justice that a defendant knows when he has reached that point. One cannot assume that a guilty plea has been accepted when the defendant pleads guilty and describes the factual basis for the guilty plea, particularly when said defendant has no constitutional right to have the guilty plea accepted. *Whitlow v. State*, 357 Ark. 290, 166 S.W.3d 45 (2004) (citing *Singer v. United States*, 380 U.S. 24 (1965); *Lynch v. Overholser*, 369 U.S. 705 (1962)). Thus, a guilty plea should not be deemed accepted absent strict compliance with our rules of criminal procedure.

Here, the trial court merely stated that the record was closed. This could have meant any number of things. Was the judge accepting the plea, or was he taking the matter under consideration? Under the former, the defendant loses a right otherwise granted to him by our rules of criminal procedure. Under the latter, he retains that right until some point in the future. Due to the serious nature of a guilty plea, a defendant is entitled to know whether his guilty plea has been accepted and to an explicit finding of guilt on the record. To construe Rule 26.1(a) to allow for anything less goes against longstanding precedent requiring courts to strictly construe criminal statutes and to resolve any doubts in favor of the defendant. Implicit acceptance of a guilty plea also runs counter to the idea of a presumption against waiver of fundamental constitutional rights, see *Michigan v. Jackson*, 475 U.S. 625

(1986), and the idea that any waiver must be knowingly, intelligently, and voluntarily made. See, e.g., *Marshall v. State*, 102 Ark. App. 175, \_\_\_ S.W.3d \_\_\_ (2008) (right to a twelve-person jury); *Croston v. State*, 95 Ark. App. 157, 234 S.W.3d 909 (2006) (self-incrimination); *Parker v. State*, 93 Ark. App. 472, 220 S.W.3d 238 (2005) (right to counsel).

The majority's opinion departs from our precedent requiring strict compliance with rules governing guilty pleas. For example, the Arkansas Reports are full of cases where an appeal was dismissed for failure to comply with the strict dictates of Rule 24.3(b), which governs conditional pleas of guilty or nolo contendere. It is well settled that, absent strict compliance with Rule 24.3(b), this court acquires no jurisdiction to hear an appeal from a guilty plea. See, e.g., *Ray v. State*, 328 Ark. 176, 941 S.W.2d 427 (1997). Therefore, even when the record clearly shows that a defendant pleaded guilty or nolo contendere while reserving a right to appeal under Rule 24.3(b), appellate courts have routinely dismissed appeals where the rule was not strictly followed. See, e.g., *McDonald v. State*, 354 Ark. 680, 124 S.W.3d 438 (2003) (dismissing appeal when the appellant filed notice of appeal from the denial of the motion to suppress rather than the judgment and commitment order); *Berry v. City of Fayetteville*, 354 Ark. 470, 125 S.W.3d 171 (2003) (dismissing appeal when the appellant sought review of the constitutionality of an ordinance rather than a motion to suppress); *Waters v. State*, 102 Ark. App. 8, \_\_\_ S.W.3d \_\_\_ (2008) (dismissing appeal when a defendant signed a form guilty-plea statement wherein the form stated that he relinquished his right to appeal, despite the fact that the word "conditional" was written on the form in several places); *Webb v. State*, 94 Ark. App. 234, 228 S.W.3d 527 (2006) (dismissing appeal

when the appellant filed notice of appeal from the conditional guilty-plea agreement rather than the judgment and commitment order); *Bristow v. State*, 82 Ark. App. 145, 119 S.W.3d 527 (2003) (dismissing appeal when the prosecutor failed to sign the document assenting to the conditional plea). Further, the rules of criminal procedure require that the court make several inquiries before accepting a guilty plea. *See* Ark. R. Crim. P. 24.5 (requiring the court to determine the voluntariness of a plea); Ark. R. Crim. P. 24.6 (requiring the court to cause a guilty plea to be on a verbatim record). I find it unusual that such strict compliance is required once the plea has been taken but not prior to accepting the plea.

Accordingly, I would grant appellant's petition for rehearing, reverse the denial of the motion to withdraw the guilty plea, and remand this case for further proceedings. Because a majority of my colleagues have voted to the contrary, I must respectfully dissent.